Supreme Court, U.S.
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No. 96-1171

In The

Supreme Court of the United States

October Term, 1996

ALTON WAYNE SMITH,

Petitioner,

vs.

SHIRLEY WOODIE, individually and in her official capacity as President of Alabama Aviation and Technical College, FRED GAINOUS, in his official capacity as Chancellor, and JOHN FERGUS, individually and in his official capacity as Dean of Instruction of Alabama Aviation and Technical College,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

BRIEF IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction to consider Petitioner's argument, since the issues presented to this Court were neither decided nor timely presented to Alabama's courts?

2. Does this Court lack jurisdiction to consider Petitioner's argument, since the state court decision rests upon adequate and independent state grounds, in that:

a. The Supreme Court of Alabama decision was expressly based upon a nonfederal ground?

b. The Supreme Court of Alabama is presumed to have based its denial of rehearing on a state ground?

c. The trial court's decision was also based upon the limitations period lapsing?

d. The trial court's decision was also justified by Petitioner's failure to timely oppose Respondents' motions for summary judgment?

3. Was Alabama's application of its rules of practice and issue preclusion to Petitioner's 42 U.S.C. § 1983 claim a valid exercise of State authority?

4. Are the issues presented by Petitioner to this Court such that they do not warrant this Court's attention, since they relate only to the Petitioner and whatever few other litigants whose counsel might choose to ignore Alabama's rules of practice for seeking judicial review of agency decisions?

LIST OF INTERESTED PERSONS

The Petitioner is correctly identified, in the caption to the Petition for Writ of Certiorari, as Alton Wayne Smith.

The Respondents are not correctly identified in the caption to the Petition. Dr. Shirley Woodie, both in her individual capacity and in her official capacity as President of Alabama Aviation and Technical College, is correctly identified as a Respondent. Mr. John Fergus, both in his individual capacity and in his official capacity as Dean of Instruction at Alabama Aviation and Technical College, is also correctly identified as a Respondent. However, Alabama Aviation and Technical College is not a Respondent to the Petition. Although Alabama Aviation and Technical College was named as a defendant to Petitioner Smith's amended complaint, Petitioner did not appeal the trial court's entry of summary judgment in favor of said college. *See* Petition, at p. B-7. Furthermore, with respect to Dr. Fred Gainous, he was named as a defendant, to the amended complaint, both individually and in his official capacity as Chancellor. However, on appeal the Petitioner specifically stated that he was not challenging the trial court's grant of summary judgment to Dr. Gainous individually. *Brief of Appellant Alton Wayne Smith* [to the Alabama Court of Civil Appeals], at p. 18. Consequently, Dr. Fred Gainous is a Respondent, to the instant Petition, only in his official capacity as Chancellor.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the instant petition for writ of certiorari (hereinafter referred to as the "Petition") seeking review of an opinion of the Supreme Court of Alabama. The Supreme Court of Alabama opinion is reported as *Ex parte Alton Wayne Smith*, 638 So. 2d 431, 1996 LEXIS 173 (Ala. 1996), *petition for writ of cert. filed*, 65 U.S. 3531 (January 23, 1997) (No. 96-117).

STATEMENT OF JURISDICTION

Because the questions presented for review in the petition were not timely presented to the Supreme Court of Alabama, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). *See* pp. 9-13 below. Nor does this Court possess jurisdiction over this case since the Supreme Court of Alabama decision and trial court judgment were based upon adequate and independent state grounds. *See* pp. 13-22 below.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved in this case include the First and Fourteenth Amendments to the United States Constitution. The federal statutes involved are 28 U.S.C. § 1257(a), 42 U.S.C. § 1983, and 42 U.S.C. § 1988. Pertinent state authority includes *Ala. Code* § 6-2-38 (1975); Rules 1(c), 9(h), 15(c), and 56, Ala. R. Civ. P.; Rule 28(a)(5), A.R.A.P.; the *Revised Hearing Procedure* of the Alabama State Board of Education; and, according to the Supreme Court of Alabama, also *Ala. Code* §§ 36-26-100-108 and § 41-22-20(k)(1) (1975). Although the Petitioner asserts that *Ala. Code* § 16-24-30-38 (1975) is among the pertinent state statutory authority (*see Petition*, at pp. 2, I-14-20), said section (relating exclusively to Alabama public elementary and secondary teachers, and having no relationship to Petitioner and other Alabama two-year college teachers) has no relevance whatsoever

to this case. Insofar as the Petitioner states that the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution is involved, said Clause is not pertinent to this appeal since, although Petitioner's amended complaint included an allegation that his right to equal protection of the laws had been abridged, on appeal through Alabama's appellate courts, Petitioner abandoned such allegation.

STATEMENT OF THE CASE

A. Statement Of Facts

Petitioner Alton Wayne Smith was employed, as a tenured ("nonprobationary") instructor of avionics, at Alabama Aviation And Technical College (hereinafter referred to as the "College"), a trade school located in Ozark, Alabama. Petitioner Smith's employment was terminated for "good and just causes," set forth in an August 28, 1991 written notice of termination from Dr. Shirley Woodie, President of the College. C-184-192; C-153-192.[1] Petitioner was fired for those reasons alone, and not for arbitrary, political, or personal reasons, such as Petitioner's having exercised his First Amendment free speech rights through allegedly making remarks critical of former or then current college officials or education policies. C-153-192.

The College presented to an administrative hearing panel (the "employee review panel"), which heard Petitioner's appeal of his firing, and to the trial court, overwhelming proof that President Woodie had much more

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[1] The "record on appeal" to the Alabama Court of Civil Appeals and Supreme Court of Alabama, recording the proceedings before the Circuit Court of Dale County, Alabama (the "trial court") and the court reporter's transcription of a hearing before the administrative body known as the "employee review panel," is contained in ten volumes, which are consecutively page-numbered and which will be referenced herein as "C Page."

than ample reasons to fire Petitioner. C-115-152. The evidence as to why Petitioner's employment was terminated (C-115-900), demonstrated the extremely improper, and indeed bizarre, behavior in which the Petitioner engaged. For example, for three consecutive days, Petitioner distracted another instructor, and that instructor's class, by appearing on the other side of a glass wall (at the rear of the classroom), making the obscene gesture known as "flipping the bird," and mouthing other obscenities such as "you M . . . F . . . " C-146. On two other days, Petitioner blocked a college hallway and made physically threatening motions toward another teacher (C-146). On various other occasions, Petitioner made comments which led other instructors to believe that he may have poisoned their coffee with battery acid. C-151; C-158.

Petitioner also deliberately committed numerous violations of the College's written sick leave policy (*see* Petition, at pp. B-2-3; C-117-34; C-156-57), including one occasion when Petitioner stated that he had to be on sick leave for an entire week due to supposed *emergency* surgery, in Jacksonville, Florida, on his wife. However, as the records from Mayo Clinic – Jacksonville and St. Luke's Hospital made quite evident, Petitioner's wife did *not* have emergency surgery but instead had elective cosmetic breast reduction surgery, which her physician had indicated months before could be scheduled at her convenience. During the following week, Petitioner asserted to College officials that it was necessary for him to miss all his classes for that entire week to take care of his wife, when, in fact, he did not need to attend to his wife. C-117-34.

Petitioner's misconduct also included other serious aspects. Petitioner often, without advance warning or explanation, would exit his classroom, leaving his students without supervision. *Petition*, at p. B-3. When he remained in class, further problems developed, because Petitioner failed to follow the syllabus for the course he was teaching, tested students on material which had not

been covered in class or otherwise assigned, and inappropriately discouraged student questions. *Petition*, at p. B-3; C-158; C-141-42. Indeed, student dissatisfaction with Petitioner became so great that a relatively large group of students "en masse" refused to register for the Fall 1990 quarter unless they were assured that Petitioner would not be their instructor. *Petition*, at p. B-3. Furthermore, on July 19, 1991 all 14 of the students in one of Petitioner's classes signed and delivered to Respondent Fergus a *unanimous* petition of protest, listing their specific complaints about Petitioner. *Petition*, at p. B-3; C-137; C-139-40.

B. Course of Proceedings And Disposition Of The Case Below

The administrative proceedings regarding the appeal of Petitioner's termination were conducted pursuant to the "Revised Hearing Procedure" of the State Board of Education. *Petition*, at p. B-2. The Revised Hearing Procedure provides for the same administrative appeal process as does the "Fair Dismissal Act," codified at Ala. Code §§ 36-26-100-108 (1975).

Pursuant to the process set forth in the Procedure, on August 28, 1991, President Woodie delivered a written "notice of termination" of employment. C-153-154; 183-207. The notice stated the reasons for the termination, informed Petitioner of his right to administratively contest and appeal the President's decision, advised Petitioner as to which persons may be called to testify on behalf of the College in the event of an appellate hearing, and described the witnesses' potential testimony. Under the Procedure, if Petitioner desired to appeal his firing, then he had fifteen days in which to file a written notice of appeal and request a hearing before a three-person hearing panel (called an "employee review panel"). Petitioner timely appealed.

The Procedure further provides that the members of the hearing panel are then to be selected, with the first of

three panel members being selected by the employing college. The second panel member is selected by the employee. The third panel member is chosen by a process of elimination. Specifically, one or both parties request that the local probate judge provide to the parties a list of three persons whom the judge believes are able to render an impartial decision. Upon receipt of such a list, the employing college strikes one name from the list, and the employee then strikes another name. The person remaining on the list becomes the third panel member. This selection process was followed in Petitioner's appeal of his termination from employment. Although Petitioner attempts, in his Petition, to complain that the employee review panel members were not attorneys, (and Petitioner Smith claims that such worked to violate his federal rights – *see Petition*, at p. 13), Petitioner himself voluntarily selected, as the second panel member, an individual who was not an attorney.

During the employee review panel hearing (which took place on October, 26, 1991, October 28, 1991, and November 3, 1991), the College presented overwhelming evidence that Petitioner had engaged in the inappropriate behavior described hereinabove (and summarized in the Court of Civil Appeals Opinion). Petitioner's attorney cross-examined the College's witnesses, and presented witnesses on behalf of Petitioner. During the hearing, Petitioner challenged the accuracy of the charges made against him, contended that his conduct was not inappropriate, argued that he was fired due to his filing a State Board of Adjustment claim, *and* argued that he was being fired for exercising his First Amendment right of free speech in criticizing various people, policies, or events. C-528-33; C-1498-1501; C-154; C-515.

After concluding the hearing, the panel issued its *unanimous*, November 7, 1991, decision upholding the termination of Petitioner's employment as being for good and just causes, not for personal or political reasons, and as not being arbitrary or capricious.

On August 25, 1993, Petitioner filed, in Dale County, Alabama Circuit Court, a complaint against the College, Dr. Shirley Woodie (in her individual capacity only), and various fictitious defendants. The complaint consisted of four counts: (1) "Breach of Contract"; (2) "Breach of Implied Covenant of Good Faith and Fair Dealing"; (3) "Intentional Infliction of Emotional Distress"; and (4) "Retaliatory Discharge". C-5-7.

On November 8, 1993, *after* the applicable two-year statute of limitations period had already run, Petitioner filed an amended complaint, which attempted to add as defendants Dr. Fred Gainous, individually and in his official capacity as Chancellor, John Fergus, individually and in his official capacity as Dean of Instruction of the College, and Dr. Shirley Woodie in her official capacity as President of the College. C-34-35. The pleading then proceeded to state a number of erroneous "factual" allegations. (C-35-37) that Petitioner had made various (presumably oral) comments, and had written various letters, critical of his employer and/or its former officials.

Petitioner also asserted that on or about August 28, 1991, he was notified that his employment was being terminated, that thereafter a hearing was conducted on the matter of the appeal of his termination, and that the various allegations of misconduct presented to the administrative hearing panel were not the true reasons for his termination from employment, but that the true reason he was fired was "to cause the Plaintiff to quit exercising his First Amendment privileges and vocally criticizing wasteful or dishonest practices of the Defendants." C-37. Petitioner neglected to explain why he contended, in the amended complaint, that he was fired due to his "free speech", when he had asserted unequivocally in his original Complaint that the "*sole reason*" he was fired was because he filed a claim with the State Board of Adjustment. C-6-7. The amended complaint presented four additional counts. The count pertinent to this appeal stated, in its entirety, that:

> "The Plaintiff alleges that the Defendants are liable to him under 42 U.S.C. § 1983 because they violated his First Amendment right of free speech." C-38.

All of the Respondents filed joint motions to dismiss, or in the alternative, motions for summary judgment (C-111-112; C-1779), accompanied by voluminous supporting affidavits, medical records, college records, and other evidence. C-113-900; C-1722-1725. Pursuant to Rule 56 Ala. R. Civ. P. (*see* Appendix B), a narrative summary of undisputed material facts was also filed. C-115-149; C-1726-1761. In addition, in order to substantiate the Respondents' collateral estoppel/issue preclusion defense, a copy of the administrative hearing record was filed. C-901-1721.

Thereafter, over a period of seven months, Petitioner twice changed attorneys and was twice granted continuances of the hearing on Respondents' motions for summary judgment. *See Petition*, at Appendix B.

Eventually, the summary judgment hearing was reset for July 25, 1994, but neither Petitioner nor his attorney appeared at the summary judgment hearing. The trial court entered a summary judgment for the Respondents on August 12, 1994, holding that: all state claims against the College and Respondents Woodie, Fergus, and Gainous in their official capacities were due to be dismissed because of state immunity; that all federal claims against the College were due to be dismissed because the College was not a suable "person" under 42 U.S.C. § 1983; that all claims were barred (that is collaterally estopped) by the employee review panel decision; that the § 1983 claims were barred by the statute of limitations; and that Petitioner had failed to state a valid claim for relief under § 1983. C-1809-10; C-1790-1808.

On September 12, 1994, Petitioner filed a motion to vacate or set aside the judgment, or in the alternative for a new trial. C-1811-75. As grounds for this motion, Petitioner alleged that he did not receive notice of the summary judgment hearing conducted by the trial court on July 25, 1994 (even though Court records showed that

notice was sent to Petitioner's third attorney on June 21, 1994); that his complaint set forth a claim for relief under § 1983; and that the facts before the trial court created a genuine issue of material fact. After conducting a hearing on Petitioner's motion, on October 25, 1994, the trial court denied Petitioner's motion, finding that it had not erred in granting the Respondents' motions for summary judgment. C-1917-18.

Petitioner appealed the summary judgment, seeking reversal and remand only as to the claim(s) purportedly alleged, in his amended complaint, pursuant to 42 U.S.C. § 1983, as to Respondents Woodie, Fergus, and Gainous. On June 16, 1995, the Alabama Court of Civil Appeals affirmed, opining that issue preclusion was dispositive of Petitioner's Section 1983 claim(s). *See* Appendix B to *Petition*. On July 25, 1995, Mr. Smith filed an application for rehearing, which was overruled on August 18, 1995.

Through his sixth and seventh attorneys, on September 1, 1995, Petitioner filed with the Supreme Court of Alabama a petition for writ of certiorari. Thereafter, the petition was granted. On June 28, 1996, the Supreme Court affirmed the Alabama Court of Civil Appeals, and, on October 25, 1996, overruled Petitioner's application for rehearing. *See* Appendices A and F to *Petition*. The instant petition to this Court followed.

C. Correction Of Misstatements In The Petition

Although understandably not something which the Petitioner desires to mention, the facts of the case were accurately set forth in the Alabama Court of Civil Appeals decision, attached to the Petition as Appendix B thereto. As noted in the *Constitutional Provisions, Statutes, And Rules Involved* section hereinabove, Petitioner is mistaken about the applicability of certain constitutional provisions and statutes to this case. Petitioner is also mistaken, in several respects, with regard to what the Supreme Court of Alabama held, what was and was not procedurally required of Petitioner, and the consistency

of the decisions below with other pertinent precedent. For convenience and clarity, the relevant misstatements are addressed in the Argument below.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S ARGUMENT, SINCE THE ISSUES PRESENTED WERE NEITHER DECIDED NOR TIMELY PRESENTED TO ALABAMA'S COURTS

This Court lacks jurisdiction to consider the questions presented in the Petition because such questions were neither decided by, nor timely presented to, Alabama's courts. 42 U.S.C. § 1257 requires, of course, (a) that there be a final judgment or decree rendered by "the highest court of a State in which a decision could be had," and (b) that the final judgment must reflect a substantial federal question that has been *properly raised* and *necessarily decided* in the state court proceedings." R. Stern et al., *Supreme Court Practice*, sec. 3.1, at p. 90 (7th ed. 1993). The proper method of raising the federal question is determined by state law. *Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, dissenting) ("It is relevant and usually sufficient to ask whether petitioners satisfied the state rules governing presentation of issues").

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). In accord: R. Stern et al., *Supreme Court Practice*, sec. 3.17, at p. 122 (7th ed. 1993) ("The party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised"), and cases cited therein. "If the petitioner or appellant adequately discharges this burden,

and if the federal question was necessary to a determination of the case and no adequate state ground of decision is apparent, then and then only can the Supreme Court take jurisdiction over the case." *Id.*, at p. 123.

Furthermore, if the state procedural requirements are not complied with, the Supreme Court will decline to exercise jurisdiction, regardless of whether or not the highest state court expressly refused to decide the federal question because of the procedural failure, or was completely silent on the federal question (the Court assumes that the silence is due to the procedural deficiency). *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). Thus, an application for rehearing, submitted to the highest state court, which raises the federal question for the first time, is generally insufficient to establish jurisdiction in this Court, unless the state court expressly considered and decided the question presented on rehearing. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Prudential Federal Savings and Loan Association v. Flanigan*, 478 U.S. 1311, 107 S.Ct. 38, 92 L.Ed.2d 761 (1986); *Webb v. Webb*, 451 U.S. 493 (1981); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443, 55 S.Ct. 794, 795 (1935).

The Respondents realize, of course, that there are extremely limited situations in which raising a federal question for the first time in a petition for rehearing may be considered timely. But such situations occur only where the federal question arises from an *unexpected* decision of the highest state court, which gave the petitioner no prior opportunity to assert the particular federal question, but instead, was a surprise and could not have been reasonably anticipated. *Herndon v. Georgia, supra; Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930); R. Stern et al., *Supreme Court Practice*, sec. 3.1, at p. 129 (7th ed. 1993).

Petitioner has neither asserted that the instant case fits within the *Herndon* exception, nor articulated just how he may have failed to anticipate the Alabama

Supreme Court's decision. Petitioner merely states that "the sole basis for [the Supreme Court of Alabama's] ruling against Smith . . . was that Smith failed to exhaust his administrative remedies," and such a "question of administrative exhaustion had not been briefed or argued in any lower tribunal." *Petition* at p. 4. Petitioner goes on to state that he therefore "filed for rehearing" and therein "asserted that the court's newly articulated rule violated the Supremacy Clause . . . and the Fourteenth Amendment," but that his application was denied without opinion. *Petition for Writ of Certiorari,* at p. 4.

Even if Petitioner had argued to this Court that he was justifiably surprised by the Alabama Supreme Court's decision, insofar as it applied issue preclusion based upon the ruling of the employee review panel, as to which ruling the Petitioner did not seek judicial review by petitioning for writ of certiorari, such argument would have been erroneous. Indeed, Petitioner would have needed to convincingly persuade this Court that, prior to the Supreme Court of Alabama decision in this case, he had no reason to anticipate that, in order to not be bound to an employee review panel ruling, he needed to seek judicial review of such a ruling by filing, in an Alabama trial (circuit) court, a petition for writ of certiorari to the panel, and prevail in such trial court proceeding. However, even a cursory review of Alabama cases concerning employee review panel decisions would have easily disclosed to Petitioner's former attorneys that, in order to successfully present his claims in Alabama's courts, Petitioner must, consistent with Alabama's rules of practice, seek relief from the employee review panel decision by petition for writ of certiorari.

For example, in *Hughes v. Britnell,* 554 So. 2d 1041, 1042-43 (Ala. Civ. App. 1989), *cert. denied,* 596 So. 2d 56 (1989), some *four years before* Petitioner's suit, the Alabama Court of Civil Appeals reviewed a circuit court's grant of summary judgment to a State two-year college president, in two college employees' lawsuits subsequent to employee review panel decisions with which the

employees were dissatisfied. Noting that the employees had improperly sought relief through a petition for mandamus, rather than filing a petition for writ of certiorari, the Court cautioned future litigants as follows:

> "This case is before us as an appeal from the summary dismissal of a writ of mandamus. We wish to emphasize that . . . the proper vehicle for review to the circuit court is by a writ of certiorari. Fields v. State ex rel. Jones, 534 So. 2d 615 (Ala.Civ.Appl. 1987); Ex parte Smith, 394 So. 2d 45 (Ala.Civ.App. 1981). From a decision by the circuit court on the writ of certiorari, review to this court would be on an appeal. Fields, 534 So. 2d 615.
>
> For a complete review of the proper procedure to be followed in these cases, see Fields, 534 So. 2d 615."

Similarly, in *Hardy v. Birmingham Board of Education*, 634 So. 2d 574, 576 (Ala.Civ.App. 1994) the Alabama Court of Civil Appeals reiterated that "the proper vehicle for review [in] the circuit court [of an employee review panel decision] is . . . [a] writ of certiorari . . . In cases such as this, the only available means of review is the common law writ of certiorari." Since the employer had not sought such a remedy, it was, the Court ruled, bound to the panel decision, and could not just choose to simply ignore the panel decision in subsequent litigation. *Id.*, at p. 576. The Court commented that the parties to panel hearings must *follow the rulings* of the panel (even though they believe a panel exceeded its authority) or successfully *seek review thereof by certiorari*, and "For this court to find otherwise would send a message to boards of education that they may simply ignore the decisions of a review panel board." *Id.*

Therefore, Petitioner could have easily anticipated the Supreme Court of Alabama's Opinion in this case. Both the employees in *Hughes v. Britnell, supra*, and the employer in *Hardy v. Birmingham Board of Education, supra*, were told that they would be bound to the applicable

employee review panel decision absent a successful petition for writ of certiorari therefrom. Thus, even if Petitioner is attempting to fit the instant case within the *Herndon* exception, he cannot legitimately do so. Hence, this Court is without jurisdiction.

II. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S ARGUMENT, SINCE THE STATE COURT DECISION RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS

It is settled that this Court will not review a State court decision resting on an adequate and independent nonfederal ground even though the State court may have arguably also summoned to its support an erroneous view of federal law. *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed. 2d 298 (1973), 46 OGR 198, reh. denied, 414 U.S. 1138, 94 S.Ct. 884, 38 L.Ed. 2d 763, conformed to, 53 OGR 210, 544 P.2d 505, cert. denied, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed. 2d 386. Jurisdiction is lacking even "when the question of the existence of an adequate state ground [supporting the state court judgment] is debatable." *Stembridge v. Georgia*, 343 U.S. 541, 547-48 (1952); *McKinney v. City of Birmingham*, 409 U.S. 895 (1972) (dismissal of appeal due to brief being late is an adequate state ground); *McKinney v. Parsons*, 423 U.S. 960, 961 (1975) (Brennan, dissenting); *Radio Station WOW v. Johnson, supra* 65 S.Ct. 1475, 1480 (1945). Applying this principle to the instant case reveals that, in four separate respects, each of which will be discussed below, this Court lacks jurisdiction to consider the questions presented by Petitioner Smith.

A. The Supreme Court Of Alabama Decision Was Expressly Based Upon A Nonfederal Ground

Petitioner incorrectly characterizes the Alabama Supreme Court's decision as being grounded upon resolution of a *federal* question. However, the Alabama Supreme Court's decision was based, instead, upon a

state ground, over which this court lacks jurisdiction. It is clear that the Supreme Court of Alabama's decision was based upon its interpretation and application of Alabama's own rules of practice, *Code of Alabama (1975)* § 41-22-20(k)(1), and *Alabama's* rules of collateral estoppel (issue preclusion); rules developed as a matter of Alabama law. Such rules concern the preclusive effect to be given to issues decided by an administrative agency, regardless of whether or not the issue precluded is relevant to a claim for relief arising from state law or federal law, or both. Put another way, the Supreme Court of Alabama Opinion with which Petitioner Smith is dissatisfied was arrived at through the Court's interpretation of *state* law and state rules of practice, and not 42 U.S.C. § 1983. "A state procedural rule which forbids the raising of federal questions at late stages in the case, *or by any other than a prescribed method*, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). As such, the Supreme Court of Alabama decision rests upon an adequate State ground, independent of any "federal question."

A state court decision denying relief because of a litigant's wrong choice of remedy or forum is an adequate *state* ground precluding this Court from reviewing a federal question. *Edelman v. California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Hammerstein v. Superior Court of California*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135, reh. denied, 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637 (1951); *Copperwell Steel Co. v. Industrial Con.*, 324 U.S. 780, 65 S.Ct. 1006, 89 L.Ed. 1363 (1945). Consequently, this Court is without jurisdiction. *McCoy v. Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928); *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925); *Mellon Co. v. McCafferty*, 239 U.S. 134, 36 S.Ct. 94, 60 L.Ed. 181 (1915); *McQuade v. Trenton*, 172 U.S. 636, 19 S.Ct. 292, 43 L.Ed. 581 (1899). *See also*, 24 L.Ed. 2d 837, 849-53.

B. The Supreme Court Of Alabama Is Presumed To Have Based Its Denial Of Rehearing On A State Ground

Second, the Petitioner's failure to raise the alleged "federal questions" presented in his petition for writ of certiorari until his application for rehearing to the Supreme Court of Alabama, combined with the fact that the Supreme Court denied rehearing without opinion or other comment, effectively renders the Supreme Court of Alabama decision to be a judgment based upon an adequate state ground. *Radio Station WOW v. Johnson, supra.* This is because a state court's denial of rehearing, even when issued without opinion and without any comment as to the reasons for the denial, is, unless it can be affirmatively shown otherwise, assumed by this Court to have been due to a procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945).

In this regard it is important to note that the burden of persuasion rests squarely upon the shoulders of Petitioner Smith to convince this Court that the denial of rehearing below was caused by reasons exclusive of his having first presented the purported federal question in his application for rehearing. Has Petitioner Smith sufficiently discharged this burden? No. Indeed, Petitioner has made no showing whatsoever in this respect. Therefore, under the assumption mandated by *Bailey v. Anderson, supra,* since the Supreme Court of Alabama denial of rehearing is grounded upon the adequate state ground of procedural deficiency, this Court is without jurisdiction to review the Alabama Supreme Court's Opinion.

C. The Trial Court's Decision Was Also Based Upon The Limitations Period Lapsing

Moreover, the trial court's judgment was based upon yet another adequate state ground, independent of the alleged "federal" question presented in the *Petition.* Specifically, the trial court concluded that Petitioner's claim for relief under 42 U.S.C. § 1983 was barred as untimely

under *Ala. Code* § 6-2-38 (1975). In its *Memorandum Opinion*, granting summary judgment, the Circuit Court of Dale County, Alabama opined as follows:

> "The claims brought by Plaintiff Smith under 42 U.S.C. § 1983 are those stated in his Amendment to Complaint. The Court finds that the Section 1983 claims made in the Amendment to Complaint are barred by the applicable two-year statute of limitations. It is the law in Alabama that a claim brought under Section 1983 must be brought within two years of the occurrence upon which the claim is based. *Holland v. Barton*, 600 So. 2d 233, Ala. LEXIS 1147 (Ala. 1992); *Free v. Granger*, 887 F.2d 1552, n.1 (11th Cir., 1989); *Jones v. Preuit & Mauedin*, 876 F.2d 1480 (11th Cir. 1989). Inasmuch as the Amendment to Complaint was filed on November 8, 1993 concerning a termination which occurred on August 31, 1991, the Court finds that the claims submitted under Section 1983 are barred by the applicable two-year statute of limitations period.
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> "While the Plaintiff might, but did not, argue that the Section 1983 claims "relate back" to the State claims made in the original Complaint on August 25, 1993, the Court finds that there was no relation back between the Federal Constitutional claims made in the Amendment to Complaint and the breach of contract and other claims brought in the original Complaint. Therefore, Counts IV – VII of the Amendment to Complaint are dismissed as being not timely filed."
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> C-1802-03.[2]

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[2] Federal law dictates when a Section 1983 action accrues. However, *state* law, specifically, Rules 15(c) and 9(h), Ala. R. Civ. P. (*see* Appendices C & D), controls whether or not a new count, against new defendants, in an amended complaint, such as the

Thereafter, on appeal to the Court of Civil Appeals, both the Petitioner and Respondents argued whether or not this statute of limitations ground for the trial court's judgment was erroneous. *See* Appendix H, at H-2. The Court of Civil Appeals, having concluded that the trial court was correct in finding Petitioner's Section 1983 claim to be subject to issue preclusion, found it unnecessary to reach the statute of limitations and other grounds relied upon by the trial court. The Supreme Court of Alabama granted review of the Court of Appeals decision by certiorari. In their brief to the Supreme Court of Alabama, the Respondents repeated their statute of limitations argument. *See* Appendix G. However, *Petitioner* did *not*, in his briefs to the Supreme Court of Alabama, attack the trial court's judgment insofar as it was grounded upon the statute of limitations bar.

A state court judgment denying relief as being barred by a state statute of limitations is an adequate state ground, precluding this Court from reviewing a federal question. *Wood v. Chesborough*, 288 U.S. 672, 33 S.Ct. 706, 57 L.Ed. 1018 (1913); *Rogers v. Jones*, 214 U.S. 196, 29 S.Ct. 635, 53 L.Ed. 965 (1909); *Elder v. Wood*, 208 U.S. 226, 28 S.Ct. 263, 52 L.Ed. 464 (1908); *Seneca Nation v. Christy*, 162 U.S. 283, 16 S.Ct. 828, 40 L.Ed. 970 (1896). *See also* Jeffery F. Ghent, *Noncompliance With State Procedural Rule As Constituting 'Adequate State Ground' For Denial Of Relief So As To Preclude Supreme Court Review Of Federal Question*, 24 L.Ed. 2d 837, 844-45.

Thus, the case at bar fits squarely within this Court's ruling in *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed. 2d 298 (1973), 46 OGR 198, reh. denied, 414 U.S. 1138, 94 S.Ct. 884, 38 L.Ed. 2d 763, conformed to, 53 OGR 210, 544 P.2d 505, cert. denied, 426 U.S. 935, 96

Section 1983 claim, "relates back" to the original complaint (or whether or not the Alabama two-year statute period is tolled.) *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Ortiz v. City of Imperial*, 884 F.2d 1312 (9th Cir. 1989); *Herman v. City of Chicago*, 870 F.2d 400, 403 (7th Cir. 1989).

S.Ct. 2648, 49 L.Ed. 2d 386. Therein this Court correctly noted that the trial court's judgment may have been based, not only upon resolution of a federal question, but also upon a state statute of limitations bar. *Id*, at 101-02. This Court also noted that the petitioner therein may have waived his right to challenge the correctness of the trial court's ruling concerning the statute of limitations, by not attacking such ruling as part of his appeal before the state's appellate courts. *Id*, at p. 101-02. Accordingly, this Court refused to render an advisory opinion on the federal question presented, since the trial court's judgment could have been based on an adequate, independent state ground. On further proceedings in the Oklahoma appellate court, this Court's lack of jurisdiction was confirmed. 544 P.2d 505.

Likewise, in the in tant case, the trial court found Petitioner's claim under 42 U.S.C. § 1983 to be untimely under Alabama's applicable two-year statute of limitations. Such finding is an adequate state ground, not dependent upon resolution of the purported "federal" questions presented by Petitioner to this Court. Also, Petitioner's failure to renew, before the Supreme Court of Alabama, his challenge to the trial court's statute of limitations ground for entry of summary judgment, constitutes another state ground for the judgment below. Therefore, Respondents respectfully submit that this Court lacks jurisdiction to consider the Petition herein.[3]

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[3] In their answers to the complaint and amended complaint, the Respondents also raised the defense of laches. C-056; C-1769. Although the trial court and Alabama's appellate courts found it unnecessary to reach the laches issue (C-1797), laches provides yet another potential adequate state ground for the trial court's judgment. In *Hughes v. Britnell*, 554 So. 2d 1041, 1042 (Ala.Civ.App. 1989), *cert. denied*, 596 So. 2d 56 (1989), the Alabama Court of Civil Appeals held that an employee's suit was barred by the doctrine of laches, because the employee waited 18 months after an employee review panel's decision to file suit.

D. The Trial Court's Decision Was Also Justified By Petitioner's Failure To Timely Oppose Respondents' Motions For Summary Judgment

Even if this Court were, on the basis of the so-called "federal" questions presented, to vacate or reverse the Supreme Court of Alabama decision, thereafter Alabama's appellate courts would review other adequate state grounds supporting the trial court's entry of summary judgment, grounds the consideration of which were pretermitted by the Alabama Court of Civil Appeals. One of such grounds is that, under Rule 56(c) of the Alabama Rules of Civil Procedure (Ala. R. Civ. P.), the trial court's entry of summary judgment was justified, since the Petitioner failed to timely file substantial admissible evidence opposing the Respondents' motions for summary judgment. In other words, there presently exists an adequate state ground (Petitioner's failure to timely oppose the summary judgment motions), independent of the alleged "federal" question presented to this Court, upon which the trial court based its decision, and which Alabama's appellate courts have so far found it unnecessary to review, but, if necessary, would almost certainly affirm. Therefore, this Court should not devote its valuable resources to reviewing the question presented by Petitioner.

In Alabama's courts, it is axiomatic that if there are any grounds which support the result of the trial court judgment, then that judgment will be affirmed by Alabama's appellate courts, even if the trial court based its decision on different, erroneous grounds. *Bank of Southeast v. Keslin*, 380 So. 2d 826, 830 (Ala. 1980); *City of Birmingham v. Community Fire District*, 336 So. 2d 502 (Ala. 1976); *Boyd v. Brabham*, 414 So. 2d 931, 933 (Ala. 1982) ("if the trial court reaches the correct result, it is immaterial that the wrong reason may have been given"); *McMillan, Ltd. v. Warrior Drilling and Engineering Co., Inc.*, 512 So. 2d 14, 25-26 (Ala. 1986) (on rehearing).

As noted above, pursuant to Rule 56, Ala. R. Civ. P. (set forth as Appendix B to this brief), the Respondents filed motions for summary judgment. C-111-12; C-179. These motions were supported by affidavits, College records, medical records, and other evidence, demonstrating that Petitioner's employment was terminated only due to Petitioner's misconduct, and not for any other reason. C-113-900; C-1722-25.

Although Petitioner Smith, as the non-moving party, was not strictly required *per se* to respond to the Respondents' motions for summary judgment, Alabama's appellate courts have frequently reminded litigants that a failure to respond may be perilous. *See*, for example, *Harold Brown Bldrs., Inc. v. Jordan Co.*, 401 So. 2d 36 (Ala. 1981). The party opposing summary judgment must file substantial evidence before the date when the motion is heard. *Guess v. Snyder*, 378 So. 2d 691 (Ala. 1979); *Stallings v. Angelica Uniform Co.*, 388 So. 2d 942 (Ala. 1980). This is because, a summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Alabama Aviation & Technical College*, 683 So. 2d 426, 432 (Ala.Civ.App. 1995), affirmed, 683 So. 2d 431 (Ala. 1996), quoting Rule 56(c)(3), Ala. R. Civ. P. As the Alabama Court of Civil Appeals observed, "When a party opposing a motion for summary judgment offers no substantial evidence to contradict that presented by the movant, the trial court must consider the movant's evidence uncontroverted." *Id.*, at 432, citing *Shows v. Gonnell Trucking Co.*, 631 So. 2d 1010 (Ala. 1994). *See Petition*, at p. B-7.

In such a case, Alabama's appellate courts are also constrained to the facts as they existed, and were not in dispute, as of the date the trial court considered the summary judgment motion. *Chatham v. CSX Transportation, Inc.*, 613 So. 2d 341 (Ala. 1993); *Southern Guaranty Ins. Co. v. First Alabama Bank*, 540 So. 2d 732 (Ala. 1989)

(appellate court reviewing summary judgment uses the same standard employed by the trial court); *Hughes v. Britnell*, 554 So. 2d 1041, 1042 (Ala.Civ.App. 1989), *cert. denied*, 596 So. 2d 56 (1989) ("on appeal from a grant of summary judgment, this court cannot consider facts not before the circuit court"), citing *Purves v. PPG Industries, Inc.*, 502 So. 2d 714 (Ala. 1987).

In this case, despite more than one continuance of the hearing on the Respondents' summary judgment motions, Petitioner did not timely oppose summary judgment at all. As the Court of Civil Appeals correctly opined, "Smith failed to offer evidence to contradict the factual evidence presented by the defendants. Therefore, our review is limited to the evidence presented by the defendants to determine whether the defendants were entitled to a judgment as a matter of law." *See Petition*, at pp. B-7-8.

Quite obviously, then, as of the date that the trial court entered summary judgment in favor of the Respondents, Petitioner had failed to file any evidence, much less substantial evidence, tending to prove that he had been fired because he made comments criticizing College officials or policies, in violation of his right to free speech. Thus, on this basis (Petitioner's failure to at least create a dispute of fact material to his Section 1983 free speech claim), the trial court's summary judgment was correct, regardless of whether or not Petitioner's Section 1983 claim was barred by Alabama's rules of issue preclusion. Therefore, under the principles discussed above, the trial court's judgment was proper, and appropriately affirmed by Alabama's appellate courts.[4] As such, the judgment

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[4] Moreover, Alabama's rules of practice are such that issues not properly argued in brief on appeal are waived. Rule 28(a)(5), Alabama Rules of Appellate Procedure, requires an appellant to include in his brief an argument which "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the

was justified by an adequate state ground, independent of the "federal" question presented in the *Petition*. Hence, this case is not now properly within this Court's jurisdiction. *Paschall v. Christie-Stewart, Inc., supra.*

III. ALABAMA'S APPLICATION OF ITS RULES OF PRACTICE AND ISSUE PRECLUSION TO PETITIONER'S SECTION 1983 CLAIM WAS A VALID EXERCISE OF STATE AUTHORITY

Even if this Court were to conclude that it possessed jurisdiction to consider the questions presented in the Petition, the Argument presented by Petitioner misstates or misconstrues what occurred in Alabama's courts. The argument and "questions presented" to this Court by Petitioner, at best, reveal a fundamental misunderstanding of what constitutes "exhaustion of administrative remedies," and worse, assail the Supreme Court of Alabama for rendering a decision never in fact made.

Petitioner's first "question presented" is, "May a state court . . . require litigants to exhaust inadequate administrative remedies as a condition precedent to filing a § 1983 claim?" *Petition*, at p. i. Apparently, by stating the question in such a manner, Petitioner would have this Court believe that the Supreme Court of Alabama, in its decision, answered the question "yes." Most any reasonably competent practitioner in constitutional law would know that a Section 1983 litigant would rarely, if ever, be *required* to avail himself of administrative remedies as a

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authorities, statutes and parts of the record relied upon." Rule 28(a)(5), A.R.A.P. *Bland v. State*, 277 Ala. 4, 166 So. 2d 735 (Ala. 1964). Petitioner's brief to the Alabama Court of Civil Appeals contained only brief mention (some six sentences), about the facts before the trial court, and made no argument in response to the Respondents' extended discussion, in brief (*see* Appendix H), that summary judgment was proper given Petitioner's failure to timely oppose summary judgment. Nor did the Petitioner even address this Rule 56 defense in his Brief to the Supreme Court of Alabama.

condition precedent to filing a Section 1983 claim in federal or state courts, and the Supreme Court of Alabama did *not*, in the decision below, hold otherwise. In the opening paragraph of his Argument, Petitioner states that, "The exhaustion requirement enunciated by the Alabama Supreme Court stands irretrievably inconsistent with the explicit disposition of the exhaustion issue in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) . . . [which held] that § 1983 litigants are guaranteed immediate access to judicial forums without having to exhaust administrative remedies." Petition, at p. 5. That statement brutally misrepresents what the Supreme Court of Alabama, in fact, held. Petitioner continues on thereafter to further falsely describe the Alabama Supreme Court's decision, by asserting that the Alabama Supreme Court forced him, "as a precondition to suit," to "exhaust" the "administrative procedure" by which a State two-year college employee may appeal his termination from nonprobationary employment to a three-person "employee review panel." The Supreme Court of Alabama required no such thing.

Rather, the Opinion of the Supreme Court of Alabama, when read within the context of the circumstances of the instant case, can only be reasonably construed to mean the following: (1) As a tenured State two-year college employee who had been fired, Petitioner could have exercised his own *discretion* as to whether or not to appeal the termination of his employment to an employee review panel. (2) Although not required to do so, if Petitioner chose to make such an appeal, then (and only then) he was bound by the "final and binding" decision of the employee review panel, unless he properly sought review of the panel decision in Alabama courts, consistent with Alabama's own rules of practice. (3) The only proper method for Petitioner to obtain state judicial review of the panel decision was by filing, in circuit court, a petition for writ of certiorari to the panel and its decision. *Petition*, at pp. A-6, A-9. (4) Had Petitioner, as part of his suit, appealed the review panel decision by petitioning for a

writ of certiorari, and included, as an additional count in his complaint, a claim for relief under 42 U.S.C. § 1983, then he could, if successful, have obtained all of the relief sought. *Petition*, at p. A-9. (5) Petitioner failed, in his complaint, to seek review of the review panel's decision. *Petition*, at p. A-9. (6) In considering claims for relief, whether or not grounded in whole or in part on Alabama or federal law, Alabama's courts properly may, and will, apply Alabama's rules of issue preclusion. *Petition*, at p. A-3. This includes applying the "elements for issue preclusion applicable to administrative hearings, as announced by [the Supreme Court of Alabama] in *Ex parte Shelby Medical Center, Inc.*, 564 So. 2d 63 (Ala. 1990)." *Petition*, at p. A-3. (7) Even though federal courts use the federal common law doctrine of collateral estoppel (which does not give preclusive effect to unreviewed agency decisions) in considering Section 1983 claims *brought in federal court*, Section 1983 claims brought in *Alabama's* courts are properly subject to Alabama's rules of issue preclusion, just like any other claim brought in Alabama's courts. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). (8) The employee review panel's decision provides all of the elements necessary, under Alabama law, for application of issue preclusion to Petitioner's claims. *Petition*, at pp. A-3, A-9, B-8-10. (9) Petitioner could have easily avoided such issue preclusion, by successfully petitioning for a writ of certiorari (or, of course, by not appealing his termination from employment to an employee review panel, or possibly by bringing his Section 1983 claim in Federal court). However, since he did not, Petitioner, by his own actions, effectively "waived" the ability to avoid issue preclusion and relitigate the relevant issues, including his contention, made during the employee review panel hearing, that he was improperly fired for making remarks critical of education officials or policies (a contention which, if persuasive, would have mandated that the panel reverse the firing as having been impermissibly "arbitrarily unjust or for political or

personal reasons" – *see* Petition, at p. B-11). Petition, at pp. A-6, A-8, A-9, A-10.

With respect to issue preclusion, the Supreme Court of Alabama was imminently correct. A Section 1983 litigant does not have to pursue administrative remedies. Here, Petitioner was not required to avail himself of the opportunity to challenge his termination before the administrative body known as the "employee review panel." However, it is well established that a state court, in considering a Section 1983 claim, may apply its own rules of collateral estoppel and its own rules of practice. *Williams v. Georgia, supra.* This includes application of issue preclusion principles to the decisions of administrative bodies, so long as the rules of the particular state allow therefor. Consequently, Alabama court's have not erected an unconstitutional barrier to Section 1983 litigants obtaining full relief. Rather, Alabama's court's have simply enforced the state's own, perfectly valid, rules of practice. Thus, the predicament within which Petitioner now finds himself, is not a product of state court decisions violative of the Supremacy Clause, but instead, a direct product of Petitioner's own failure, through one of his five former attorneys, to follow Alabama's rules of practice.

Furthermore, Petitioner's argument in brief that he unfairly suffered summary judgment because the Supreme Court of Alabama denied him access to Alabama's courts until after he first exhausted administrative remedies (*see* Petition, at pp. i, 5, 11-12), if not deceptive, discloses a fundamental misunderstanding or misuse of the term "exhaustion of *administrative* remedies," at least to the extent such term is relevant to Section 1983 litigation. At pages 6-10 of the Petition, Petitioner presents a long list of cases, apparently to substantiate the statement, at page 5 of the Petition, to the effect that Section 1983 litigants "are guaranteed immediate access to judicial forums without having to exhaust administrative remedies."

The problem with Petitioner's statement is, first and foremost, that the stated principle refers only to the exhaustion of *administrative* remedies, and *not* to the availability or use of *judicial* remedies. Put another way, the principle refers to whether or not a litigant is required to avail himself of all *administrative* remedies available to him *before* he is able to obtain relief in a *judicial* forum. Thus, it has been stated that "Exhaustion of remedies is broadly stated as the withholding of judicial relief on a claim or dispute cognizable by an administrative body until the administrative process has run its course" *Gottschalk v. Hegg*, 89 S.D. 89, 92, 228 N.W.2d 640, 642 (1975), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1939). The doctrine does *not* in any manner include state rules of practice concerning the method or means by which a person may seek *judicial relief in a state court*. A state may, for example, as Alabama has done, lay down a rule of practice that persons desiring to obtain judicial review of an employee review panel decision must do so by means of a petition for a writ of certiorari, rather than a petition for a writ of mandamus. *Hughes v. Britnell, supra.*

Put another way, the doctrine of exhaustion of administrative remedies obviously relates only to one's having "used up," so to speak, the administrative remedies available, as distinguished from the method by which a person thereafter seeks *judicial* relief in Alabama's courts. Here, Petitioner exhausted the administrative remedy, which was the appeal to the employee review panel. Indeed, the administrative remedy was exhausted when the review panel issued its decision. Since Alabama's courts did not enter or affirm summary judgment on the basis of any actual or alleged non-exhaustion of administrative remedies, Petitioner's Argument is devoid of merit, and the Petition should be denied.

Respondents respectfully request the Court to also note that the Petitioner's Argument contains a number of misstatements of caselaw. Respondents shall not address

herein each of those misstatements, but shall discuss below the more significant of them.

For example, Petitioner erroneously asserts that, under the decisions below, he could not have been awarded attorneys fees and expenses, to which he was entitled under 42 U.S.C. § 1988, because the Fair Dismissal Act limited the relief available to a sharing of expenses between the employer and employee. *See Petition,* at pp. 11-12. However, the Supreme Court of Alabama does *not* purport to restrict the relief which would have been available to Petitioner. Nor does the Fair Dismissal Act (at § 36-26-106 of the Alabama Code), which authorizes sharing of the three employee review panel members' expenses, purport to limit the relief which may later be available to a prevailing Section 1983 claimant under 42 U.S.C. § 1988.

Petitioner further asserts that, under *Ex parte Averyt,* 487 So. 2d 912 (Ala. 1986), the circuit court "did not have authority to decide the constitutional issues implicated." *Petition,* at p. 13. Petitioner's absurd contention in this regard is explicitly contradicted by the Supreme Court of Alabama decision below. *See Petition,* at pp. A-9 ("the circuit court could have adequately determined the constitutional issues raised by [Petitioner]"); A-10.

Furthermore, it should be noted that Petitioner's assertion in this regard, and the argument at pages 12-14 of the Petition, is based upon Petitioner's own misinterpretation of *Averyt, supra,* which the Alabama Court of Civil Appeals correctly distinguished from the instant case. *See Petition,* at p. B-11. Although the Petitioner now attempts to construct a conflict between the decision below and *Averyt* (an alleged conflict of *State* law, with which this Court is not concerned), and build thereon a contention that the Supreme Court of Alabama has "retroactively" imposed "a fatal exhaustion requirement," Petitioner conveniently neglects to inform this Court that he never once mentioned, in his principle brief to the Supreme Court of Alabama, the holding in *Averyt,* even though he argued *Averyt* to the Alabama Court of Civil

Appeals. Consequently, the Supreme Court of Alabama was not called upon to consider the matter of which Petitioner now complains, and thus, cannot belatedly be put in error regarding such. Moreover, the supposed conflict between the decision below and *Averyt*, which Petitioner imagines to exist, and the supposed surprise and "Catch-22" of which Petitioner now complains, are, in reality, not the product of a conflict between judicial decisions, but actually the result of Petitioner's own failure to properly seek relief in Alabama's courts consistent with Alabama's rules of practice, as outlined some four years before Petitioner's suit, in *Hughes v. Britnell*, 534 So. 2d 1041, 1042-43 (Ala. Civ. App. 1989), *cert. denied*, 596 So. 2d 56 (1989). *See* Part I herein.

Also, Petitioner is hardly in a position to complain (at pp. 2 and 13 of the Petition) about the panel, which reviewed his termination and free speech assertions, being composed of non-lawyers, because *Petitioner himself* unilaterally and voluntarily selected a person to be a member of the panel who was not an attorney. Under the Procedure, Petitioner was free to choose virtually anyone. He could have chosen an attorney, or even a constitutional law professor. He chose not to. In other words, Petitioner's argument that he could only have received a fair hearing from a panel of lawyers, is betrayed by his own conduct in choosing a panel member without legal training.

IV. THE ISSUES PRESENTED BY PETITIONER TO THIS COURT DO NOT WARRANT THIS COURT'S ATTENTION, SINCE THEY RELATE ONLY THE TO PETITIONER AND WHATEVER FEW OTHER LITIGANTS WHOSE COUNSEL MIGHT CHOOSE TO IGNORE ALABAMA'S RULES OF PRACTICE FOR SEEKING JUDICIAL REVIEW OF AGENCY DECISIONS

As discussed elsewhere in this Opposition, the so-called "Catch-22" procedural predicament in which the Petitioner supposedly finds himself was not caused by

Alabama's enforcement of its rules of practice (by which judicial review of agency decisions is to be obtained through means of a circuit court petition for writ of certiorari directed to the agency), but rather, by Petitioner's own failure, through one of his several former attorneys, to avail himself of the procedural mechanism through which Petitioner could have sought review of the employee review panel's decision and fully litigated his alleged claim under 42 U.S.C. § 1983. Put another way, although Alabama's courts held Petitioner's Section 1983 claim to be subject to issue preclusion (collateral estoppel), and Petitioner now attempts to erroneously mischaracterize the results of his failure to pursue available judicial review as an "exhaustion of administrative remedies" requirement, Petitioner would have been able to fully litigate, in Alabama's courts, his Section 1983 claim if he had merely filed, in the trial court, a petition for writ of certiorari. Thus, in reality, this case does not even present a substantial federal question, but instead, demonstrates a simple failure of a plaintiff to follow a State rule of judicial procedure.

Consequently, the "questions presented" by Petitioner are questions improbable of significantly affecting the course of civil rights litigation in this nation. Rather, only the Petitioner will be affected. "The [Supreme] Court [of the United States] will seldom 'grant certiorari to correct individual injustices.' " R. Stern et al., *Supreme Court Practice*, sec. 6.30, at p. 353 (7th ed. 1993), quoting S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 615 (1984). Therefore, the petition for writ of certiorari should not be granted.

CONCLUSION

For all of the reasons discussed above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

* * *

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

* * *

APPENDIX B

* * *

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

(1) *Form of Motion and Statement in Opposition Thereto.* The motion shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative summary may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings, portions of discovery materials, or affidavits and may include citations to legal authority. Any supporting documents that are not on file shall be attached as exhibits. If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same

manner as is provided herein for a summary of undisputed material facts.

(2) *Time.* The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.

(3) *Judgment.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is

not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Evidentiary Matter Is Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(dc) District Court Rule. Rule 56 applies in the district courts except that the references to thirty (30) days and ten (10) days are reduced to fourteen (14) days and seven (7) days, respectively.

* * *

APPENDIX C

* * *

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

* * *

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, except as may be otherwise provided in Rule 13(c) for counterclaims maturing or acquired after pleading, or

(3) the amendment, other than one naming a party under the party's true name after having been initially sued under a fictitious name, changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party, or

(4) relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h).

* * *

APPENDIX D

* * *

RULE 9. PLEADING SPECIAL MATTERS

* * *

(h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.

* * *

APPENDIX E

RULE 1. SCOPE OF RULES

* * *

(c) **Construction.** These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

* * *

APPENDIX F

* * *

RULE 28. BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited;

(2) A statement of the case (The statement shall first indicate briefly the nature of the case, the course of proceedings and its disposition in the court below);

(3) A statement of the issues presented for review;

(4) A full statement of facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e));

(5) An argument (The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on); and,

(6) A short conclusion stating the precise relief sought.

(7) A brief on appeal to the Court of Criminal Appeals should also contain a list of each and every ruling by the trial court adverse to the defendant on

whose behalf the appeal is taken. Such list need only refer to the pages of the record on appeal where such rulings occur. See Form 23.

* * *

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

Appeal No. 1941820

ALTON WAYNE SMITH,

Plaintiff - Petitioner,

v.

ALABAMA AVIATION AND
TECHNICAL COLLEGE, et al.,

Defendants - Respondents.

CIRCUIT COURT OF DALE COUNTY

BRIEF OF DEFENDANTS - RESPONDENTS SHIRLEY WOODIE, FRED GAINOUS, AND JOHN FERGUS

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C. MR. SMITH'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Another alternative ground for this Court to affirm the judgment below is that Mr. Smith's Section 1983 claims were untimely, and barred by the applicable statute of limitations. In other words, even if Mr. Smith's claims under 42 U.S.C. § 1983 were not subject to collateral estoppel, they were nevertheless untimely, and therefore properly disposed of through summary judgment.

1. The Amended Complaint Was Untimely

Although the original Complaint was filed on August 25, 1993, the "Amendment to Complaint" was not filed until November 8, 1993.

The applicable statute of limitations period is two years. *Holland v. Barton,* Ala. Lexis 1147 (Ala. 1992); *Free v. Granger,* 887 F.2d 1552, n. 1 (11th Cir. 1989); *Jones v. Preuit & Mauldin,* 876 F.2d 1480 (11th Cir. 1989) (applying the then-applicable, and since-repealed, one year limitations period).

Federal law, rather than Alabama law, dictates when a Section 1983 action accrues. Such law establishes that an action growing out of an employment termination accrues on the date of the employer's action causing the termination (rather than any subsequent date on which the employment ceased). *Delaware State College v. Ricks,* 449 U.S. 250 (1980) (civil rights action by a tenured college professor denied tenure accrued when the employer gave notice to the professor of its decision); *Chardon v. Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1980);

DeLeon v. Rubero, 820 F.2d 18 (1st Cir. 1987); *Conde v. Beltran Pena*, 793 F.Supp. 33 (D. Puerto Rico 1992).

Applying the above principles to the instant case, on August 28, 1991 Mr. Smith was notified that his employment was terminated. Consequently, any Section 1983 cause of action which Mr. Smith might have had concerning his termination from employment accrued on August 28, 1991. The two-year limitations period therefore expired on August 27, 1993. Since the claims for relief pursuant to 42 U.S.C. § 1983, first contained within the Amended Complaint, were not filed until November 8, 1993, the Circuit Court properly ruled them to be barred, as untimely.

* * *

APPENDIX H

IN THE ALABAMA COURT OF CIVIL APPEALS

Appeal No. 294-0449

ALTON WAYNE SMITH,

Plaintiff - Appellant,

v.

ALABAMA AVIATION AND TECHNICAL COLLEGE, et al.,

Defendants - Appellees.

APPEAL FROM THE CIRCUIT COURT
OF DALE COUNTY

BRIEF OF DEFENDANTS – APPELLEES ALABAMA AVIATION AND TECHNICAL COLLEGE, SHIRLEY WOODIE, FRED GAINOUS, AND JOHN FERGUS

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IV. ARGUMENT

A. Summary Judgment Was Proper Given Mr. Smith's Failure To Timely File Substantial Evidence Creating A Controlling Dispute Of Material Fact, As Required By Rule 56, A.R.C.P.

In his brief to this Court, Mr. Smith asserts that this Court "should presume that Mr. Smith was terminated because of his exercise of his constitutional right to free speech. "*Brief of Appellant Alton Wayne Smith,* at p. 5 ("Statement of Facts").[2] It is fundamental, of course, that

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[2] The only apparent basis for such a remarkable assertion is contained within the three sentences immediately preceding the assertion, within Mr. Smith's Statement of Facts. Therein, Mr. Smith states, "This Statement of Facts is brief, as the facts has very little to do with the trial Court's grant of summary judgment. In particular, the summary judgment was *not* based on any suggestion by the trial Court that Mr. Smith had failed to adduce evidence that his termination was in violation of his federal constitutional rights, including his right to free speech under the First Amendment. Nor was the summary judgment based on any suggestion that Woodie and Fergus had not personally violated Mr. Smith's constitutional rights." *Brief of Appellant,* at p. 5.

Mr. Smith obviously misconstrues the significance of the Circuit Court's not specifically commenting on the facts or evidence. At most, the absence of such a comment indicates that, in light of the Defendants' legal defenses, it was *unnecessary* to reach the question of whether factual disputes existed. In other words, summary judgment is appropriate, even if there is a dispute of material fact, when any such factual disputes are not *controlling* to the disposition of the summary judgment motion. Accordingly, even if Mr. Smith had timely

for purposes of both Rule 56 (A.R.C.P.) motions and appeals from grants of summary judgment, the *facts* are established in accordance with, and *only* in accordance with, the procedures set forth within Rule 56. In the instant case, the Defendants-Appellees supported their motion for summary judgment with considerable evidence demonstrating the facts set forth within Part I of this Brief. Mr. Smith failed to timely (or even belatedly) file substantial admissible evidence in opposition thereto. Consequently, the only items to be "presumed" are those facts described in Part I and Mr. Smith's failure to minimally demonstrate an abridgement of his right to free speech.

Specifically, it is well established that the presence or absence of *controlling disputes of material fact must be ascertained as of the time the motion for summary judgment is taken under consideration,* and *not later.* Of course, the non-moving party (here, Mr. Smith) cannot merely rest upon his pleadings, but must respond to the motion for summary judgment with substantial admissible evidence in opposition, demonstrating a dispute of material fact. If the non-moving party fails to timely present such admissible evidence, then the Court is left with no alternative but to consider that evidence uncontroverted, and may properly enter summary judgment. *Eason v. Middleton,* 398 So.2d 245 (Ala. 1981); *Denniston & Co. v. Jackson,* 468

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opposed summary judgment with factual evidence tending to support his claims, administrative preclusion/collateral estoppel, immunity from suit, and other legal defenses relied upon by the trial Court still mandated the grant of summary judgment. Furthermore, as discussed, infra, Mr. Smith *Did not* effectively dispute the facts presented by Defendants.

So.2d 170 (Ala. Civil. App. 1985). Although the non-moving party is not strictly required *per se* to respond to a motion for summary judgment, Alabama's Appellant [sic] Courts have frequently reminded litigants that a failure to respond may be perilous. *See,* for example, *Harold Brown Bldrs., Inc. v. Jordan Co.,* 401 So.2d 36 (Ala. 1981). When must the response with substantial evidence be submitted? The caselaw is clear that it must be filed *before* the date when the motion is heard. Evidence filed after submission of the motion is too late, and cannot be considered. *Guess v. Snyder,* 378 So.2d 691 (Ala. 1979); *Stallings v. Angelica Uniform Co.,* 388 So.2d 942 (Ala. 1980); *Engel Mtg. Co. v. Triple K Lumber Co.,* 56 Ala. App. 337, 321 So.2d 679 (1975).

Applying these principles to the instant case yields the result that there was no evidence demonstrating a violation of Mr. Smith's constitutional rights before the trial Court as of the date summary judgment was entered. Mr. Smith filed absolutely nothing in response to the Defendants' motion prior to the date it was taken under submission. Hence, the facts as contained in Defendants' motion were uncontroverted. Mr. Smith's post-judgment Rule 59 motion attempt to dispute such facts could not be considered by the Circuit Court. Consequently, summary judgment was proper. Furthermore, although this Appellate Court is not constrained by the Circuit Court's reasoning, it is constrained to the facts as they existed, and were not disputed, as of the date summary judgment was entered. *Chatham v. CSX Transportation, Inc.,* 613 So.2d 341 (Ala. 1993).

Of course, in the Court below Mr. Smith contended, in his Rule 59 motion, that he did not have a fair opportunity to submit evidence opposing summary judgment because he did not receive adequate notice of the July 26, 1994 hearing. Yet, Mr. Smith actually had much more than ample time to respond to the summary judgment motion, and by his own lack of action, Mr. Smith suffered to his peril. Specifically, the motion for summary judgment was filed as early as December 20, 1993. Despite Mr. Smith's failure to promptly respond, the Circuit Court eventually went on to schedule the motion for a hearing. Indeed, continuances of the hearing were granted at Mr. Smith's request. For example, on March 7, 1994, the trial Court set the motion for a hearing on March 14, 1994, but on March 9, 1994 continued the hearing at Mr. Smith's request. Eventually, on June 21, 1994 the Court set the hearing for July 25, 1994, (even though Mr. Smith's counsel later indicated that he did not receive such notice). Quite obviously, Mr. Smith should have promptly filed substantial evidence opposing the motion back in December of 1993, or, at a minimum, after the March 7, 1994 notice. Indeed, when one takes "a step back" and looks at the entirety of the relevant proceedings, Mr. Smith's Rule 59 argument that he was denied a fair opportunity to respond appears even weaker. Mr. Smith had all of the time between December 20, 1993 and August 11, 1994 in which to oppose summary judgment. Mr. Smith had *eight months*! Did Plaintiff oppose the motion within the eight months? No. Did Plaintiff file *anything whatsoever* in opposition during that long period of time? No. Under these circumstances – with eight months to contradict the motion – despite his counsel's allegedly not receiving

notice of the July 25th hearing, Mr. Smith still had more than ample and fair opportunity to avoid summary judgment. Mr. Smith failed to act, at his own peril. Consequently, the lack of notice, if any, regarding the July 25, 1994 hearing was not prejudicial, and does not overcome the above discussed principles justifying, and mandating, the summary judgment for Defendants.[3]

Finally on this point, even if the Circuit court were alleged on this appeal to have committed legal error in denying Mr. Smith's Rule 59 motion, and examined whether or not there belatedly existed a dispute of material facts *as of the date the Rule 59 Motion was denied* (instead of the date the summary judgment was entered), it is nevertheless *still* apparent that the trial court acted correctly in denying the Rule 59 Motion *since no dispute of material facts existed even as of such late date.*

Specifically, if one examines the Record, particularly at pages 1811-1882 thereof, he *still finds no admissible*

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[3] It may be anticipated that Mr. Smith may argue, in reply brief, that somehow a dispute of material fact was created by the Defendants merely because they filed with the Circuit Court a copy of the administrative hearing panel proceedings record. Such an argument, however, not only ignores the burden placed upon Mr. Smith and procedures required of him by Rule 56, A.R.C.P., and ignores the precise manner in which Defendants supported their Summary Judgment motion, but would result in the absurdity of rendering Rule 56 a nullity. Indeed such an approach would mean that in any and all cases in which there had been a prior administrative proceeding, there would always be a dispute of fact, and therefore, summary judgment could never be obtained, regardless of the opposing party's failure to respond to a Rule 56 motion. Quite obviously, no such result was intended by the Alabama Rules of Civil Procedure.

evidence disputing the facts supporting the Defendants' summary judgment motion or demonstrating abridgement of Mr. Smith's right to free speech. At pages 1811-1882 of the record, the Court may find just what Mr. Smith filed with the Circuit Court in response to the grant of summary judgment, and in support of his Rule 59 motion.[4] Do these Record pages contain any authenticated, admissible items of evidence creating a dispute of material fact? No, not a shred. Instead, at pages 1811-1812 is a "Motion To Vacate Or Set Aside Judgment Or, In The Alternative, For New Trial"; at pages 1813-1834 is a "Memorandum Brief In Support Of Plaintiff's Motion To Vacate Or Set Aside Judgment Or, In The Alternative, For New Trial"; at pages 1835-1836 is an "Affidavit of John B. Crawley" (regarding his not receiving the June 24, 1994 Order); at pages 1837-1838 an "Affidavit of Lonneke Muller" (regarding such lack of receipt by counsel's secretary); at pages 1839-1840 the Case Action Summary; and at pages 1841-1875 various *unauthenticated* items of correspondence and other documents and hearsay newspaper articles.[5] There simply is *no affidavit* of Mr. Smith, or anyone else, *verifying the unauthenticated documents or offering any admissible evidence* of abridgement of free

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[4] One also examines this portion of the Record since Mr. Smith, in his brief to this Court, contends that such is the place to look for proof that summary judgment was improper. Mr. Smith states, "At the same time, Smith submitted a brief and evidence showing that summary judgment was not proper. C-1813 to C-1875." *Brief of Appellant Alton Wayne Smith*, at p. 3.

[5] At pages 1876-1877 and 1878-1880 are a "Motion To Amend Complaint" and "Second Amendment To Complaint" respectively.

speech, any admissible evidence contradicting the Defendants proof of facts, or any other substantial admissible evidence[6] whatsoever. Therefore, on this basis alone, without even having to reach the legal defenses discussed in the remaining pages of this brief, the judgment below should be affirmed.

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[6] Because this case was filed after June 11, 1987, the substantial evidence rule applies. *Code of Alabama* (1975), §12-21-12. "Substantial evidence" is defined as "Evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founder's Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989); *Ballew v. Charter Realty ERA*, 603 So.2d 877 (Ala. 1992). Furthermore, for a claim to go to a jury, a Plaintiff must put forth substantial evidence of *each and every* element of the cause of action.

APPENDIX I

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§ 6-2-38. Commencement of actions – Two years.

(a) An action by a representative to recover damages for wrongful act, omission, or negligence causing the death of the decedent under Sections 6-5-391 and 6-5-410 must be commenced within two years from the death.

(b) All actions by common carriers of property subject to Chapter 3 of Title 37 for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

(c) For recovery of charges, action shall be begun against common carriers of property by motor vehicles subject to this article within two years from the time the cause of action accrues and not after, except as provided in subsection (d) of this section; provided, that if claim for the overcharge has been presented in writing to the carrier within the two year period of limitation, said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before the expiration of the two-year period of limitation in subsection (c) of this section, a common carrier by motor vehicle subject to Chapter 3 of Title 37 begins action under subsection (c) of this section for recovery of charges in respect of the same transportation service or, without beginning action, collects charges in respect of that service, said period of limitation shall

be extended to include 90 days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purpose of subsections (b) through (f) of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

(f) The term "overcharges" as used in subsections (b) through (e) of this section shall mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the public service commission.

(g) Any action brought under Section 25-5-11(b) must be brought within two years of such injury or death.

(h) All actions for malicious prosecution must be brought within two years.

(i) All actions for seduction must be brought within two years.

(j) All actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation, must be brought within two years.

(k) All actions of libel or slander must be brought within two years.

(l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

(m) All actions for the recovery of wages, overtime, damages, fees, or penalties accruing under laws respecting the payment of wages, overtime, damages, fees, and penalties must be brought within two years.

(n) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant, or employee under the doctrine of respondeat superior must be brought within two years.

(o) All actions commenced under Section 6-5-411 to recover damages for injury or damage to property of a decedent must be brought within two years.

(p) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year.

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